

If a veterinarian sells tangible personal property that is available through retail outlets, those sales will be subject to Retailers' Occupation Tax liability even though the product may be prescribed by the veterinarian. See 86 Ill. Adm. Code 130.2165. (This is a GIL).

February 11, 2003

Dear Xxxxx:

This letter is in response to your letter to the Department of November 4, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/Laws/regs/part1200/>.

In your letter, you have stated and made inquiry as follows:

Please accept this letter as a request for a General Informational Letter ('GIL') on behalf of our client, AAA. The issue for which we are seeking a GIL is described as follows:

Specific Question at Issue.

The specific question for which we are seeking guidance is: When do sales of a product become so widespread that such sales trigger retailer's occupational (sales) tax?

Discussion/Facts.

On several recent occasions, examiners from the Illinois Department of Revenue ('IDOR') have, as an incidence to an audit of specific veterinarians, sought to assess retailer's occupational tax on reported sales of certain products that are intended to be sold only through veterinarians. Examples of these products are Frontline™, Advantage™ and Program™, all products intended to be dispensed by licensed veterinarians, and designed to repel fleas and ticks. These items are often sold by members of our client group as a corollary to the rendering of normal veterinarian services.

The companies that manufacture Frontline™, Advantage™ and Program™ sell only to licensed veterinarians, and produce these products with the intention that they only be sold to veterinarians. Frontline™ and Advantage™ are registered pesticides with the U.S. Environmental Protection Agency, while Program™ is a drug approved by the U.S. Federal Drug Administration. There obviously are valid reasons for dispensing these products only through practicing, licensed veterinarians. To do otherwise risks the health of household animals and pets, and is the reason why the makers of these products sell only to licensed practitioners. The websites for the makers of these

products all indicate that they sell only to licensed veterinarians. For example, Frontline™ is made by Merial, and their website is www.frontline.com. Program™ is manufactured by Novartis, and their website is www.petwellness.com (click on the 'regulatory' link). Lastly, Advantage™ is made by Bayer, and can be found at www.nofleas.com.

Despite this, the AAA is aware of a small number of internet companies making Frontline™, Advantage™ and Program™ available to consumers without the involvement of, or a prescription from, a licensed veterinarian. Other than these few internet related web sites, the AAA is unaware of any other pet store or pet related business selling these items on a retail basis.

Given the claims of the manufacturers of these products to sell only to licensed veterinarians, it would appear that there may be a few rogue veterinarians most likely located in other states who purchase these items in volume and in turn sell them to internet outlets. None of our AAA members is aware, and investigation has revealed no 'brick and mortar' pet supply stores that stock these items for retail sale. It would appear that the only place such items are available without a veterinarian's prescription are at these few internet locations that have secured their supply of Frontline™, Advantage™ and Program™ through unknown and possibly illegal means.

The members of the group we represent are concerned that the few sales from these internet web sites will have the effect of having the IDOR treat all sales by veterinarians as subject to the retailer's occupational tax, and we seek guidance as to IDOR's position in this regard. Of course, it is the AAA's position that the products referred to in this letter are not readily available in pet supply stores or other retail outlets, and the possibility that a consumer may find these items for sale on the internet does not require the conclusion that sales of the same items by Illinois veterinarians are subject to the tax.

Law.

Relevant authority would appear to exist at Title 86, Part 130, Section 130.2155(a), which provides that, 'when veterinarians sell items of tangible property, such as pet food, animal tags, pet collars, leashes and the like ... to purchasers for use or consumption apart from the rendering of service as veterinarians, they incur retailer's occupational tax liability.' Subsection C to this section provides an example by pointing out that if a veterinarian sells a pet diet product that is also available over-the-counter at pet supply outlets, the veterinarian incurs retailer's occupational tax on sales of that item.

A Private Letter Ruling from 1993, ST93-0443, touches upon the issue. The particular veterinarian in question in this Ruling used prescription medicines and flea dips in his practice, as well as dietary food and supplements. The Private Letter Ruling states that, 'if your client sells tangible personal property which is readily available through pet stores or other retail stores, those sales will be subject to retailer's occupational tax liability even though the product may be prescribed by your client' (emphasis added). We recognize that this Ruling cannot be relied on by the AAA as binding precedent, but we do think it fairly applies Section 130.2155(a).

Conclusion.

One or two internet outlets or companies should not be enough to change a product's tax liability. Further, the internet has opened a whole market to consumers, so that a determined Illinois resident could perhaps purchase virtually any prescription drug, for humans or animals, by placing orders with non-U.S. suppliers from Canada or Mexico.

If you have any questions about any of the issues raised in this letter, please do not hesitate to contact the undersigned attorney for the AAA. We thank you in advance for your consideration of this matter and look forward to your reply.

A veterinarian is engaged in a service occupation subject to the Service Occupation Tax. The Service Occupation Tax is a tax imposed upon tangible personal property transferred as an incident of the sale of service. See 86 Ill. Adm. Code 140.101, enclosed. If a veterinarian transfers tangible personal property to a patient as a result of the practice of veterinary medicine, the veterinarian will be subject to Service Occupation Tax for that type of transfer, rather than Retailers' Occupation Tax.

Retailers' Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. For your general information we are enclosing a copy of 86 Ill. Adm. Code Part 140 regarding sales of service and Service Occupation Tax.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon which tax base the servicemen choose to calculate their liability. Servicemen may calculate their tax base in one of four ways: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See, 86 Ill. Adm. Code 140.101(f) enclosed. This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the

Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers. See 86 Ill. Adm. Code 140.108.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self-assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. Those servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining whether they are de minimis using a transaction by transaction basis. See 86 Ill. Adm. Code 140.109.

If a veterinarian sells tangible personal property that is available at retail including purchases at retail made over the Internet, those sales will be subject to Retailers' Occupation Tax liability even though the product may be prescribed by the veterinarian. For example, certain types of pet foods and flea powders sold by veterinarians with a prescription are available through pet stores without a prescription. The sale of such products to a customer will result in Retailers' Occupation Tax liability for the veterinarian. Tax should be charged on the gross receipts from the sale. See 86 Ill. Adm. Code 130.2165, enclosed.

The information provided in your letter states that the products in question are being sold at retail. Your letter does not contain any information indicating that the products may be sold only by prescription and not at retail. Given these circumstances, it is our opinion that these products are subject to Retailers' Occupation Tax when sold by veterinarians.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Martha P. Mote
Associate Counsel

MPM:msk
Enc.